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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1678

FEDERAL POWER COMMISSION,
PETITIONER,

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *ET AL.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT MISSISSIPPI POWER & LIGHT COMPANY IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. A to Petition for Writ of Certiorari (Petition)) is reported at 522 F.2d 1345. One order (App.D to Petition) of the Federal Power Commission from which review was sought is reported at 52 F.P.C. 989 (1974). The other order (App. F to Petition) is not yet reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether, in connection with its approval of pipeline curtailment plans, the Federal Power Commission is required under the Natural Gas Act to consider if a compensation plan is necessary to insure justness and reasonableness.

STATUTES INVOLVED

In addition to those parts set out in the Petition, the Natural Gas Act, June 21, 1938, c. 566, 52 Stat. 821-833, as amended, 15 U.S.C. §§717-717w, provides:

> Section 16
>
> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

STATEMENT OF THE CASE

This proceeding was commenced by the filing with the Federal Power Commission (FPC) on August 5, 1974 of a "Petition of the Mississippi Public Service Commission for Extraordinary Relief" (C.A. App. pp. 1-8).[1] The petition for extraordinary relief requested that the FPC immediately initiate a proceeding to establish a means by which certain electric utilities operating in the State of Mississippi[2] could be compensated for the costs of the replacement fuel they are required to use as a result of the curtailment of natural gas deliveries by United Gas Pipe Line Company (United) below their contractual entitlements.

The petition for relief stated that because of severe curtailment of deliveries of natural gas by United, the three electric utilities had been forced to use increasingly greater quantities of fuel oil to replace the natural gas they otherwise would be entitled to under their contracts. The Mississippi Commission has permitted these electric utilities subject to its jurisdiction, to include fuel cost adjustment clauses in their retail rate schedules. Therefore, the cost of electric service in Mississippi has substantially increased to the ultimate detriment of the individual electric consumers in that state because oil is substantially more expensive than natural gas.

The petition for extraordinary relief asserted that a portion of this increased financial burden now being borne by those electric utilities and, consequently, their customers, should be shifted to other purchasers from United who have been accorded a higher priority for purposes of curtailment. In other words, the *financial* burden of curtailment should be distributed more equally.

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[1] "C.A. App." refers to the joint appendix in the court of appeals.

[2] Mississippi Power & Light Company (MP&L), Mississippi Power Company, and South Mississippi Electric Power Association.

After issuing a notice of the petition for extraordinary relief, the FPC denied any relief and terminated the proceeding. The basis for this denial was stated to be a lack of jurisdiction to order compensation plans because of the Natural Gas Act's requirement that a pipeline cannot be given revenues which would be greater than its cost of service plus a fair rate of return. In addition, the order stated that the FPC has no jurisdiction over the rates charged by United to its direct customers, such as the electric utilities, so as to require compensation to them.

Finally, the order concluded that the petition for relief was "nothing more than an attempt to obtain damages because of United's inability to deliver its full contractual commitment" and that such "damage liability, in the context of curtailments, is primarily a matter of contract law to be resolved by an appropriate court." (Pet. App.D, pp. 22a-23a)[3]

Applications for rehearing were filed pointing out that the FPC had misconstrued both the nature of the petition for relief and the extent of its own jurisdiction. The applications stated that under a compensation plan envisioned by the petition for relief, United's rates would not be affected because the pipeline would serve merely as a conduit for funds, passing them from higher priority customers to lower priority customers such as the electric utilities. For the same reason, the compensation could not affect rates paid United by direct sales customers and the petition for relief could not possibly be an attempt to get damages from United because its own funds would not be involved (C.A. App. pp. 145, 153).

An order denying applications for rehearing simply reiterated the statements made in the order denying relief. (Pet. App. F, p. 29a). Commissioner Brooke, however, dissented on the grounds that a compensation plan was not *per se* unlawful and, at the very least, warranted an evidentiary hearing (Pet. App. F, pp. 32a-36a).

[3] "Pet. App." refers to the Appendices attached to the Petition.

The Mississippi Commission and MP&L filed the petitions for review which instituted the proceeding in the court of appeals.

The court of appeals, in a unanimous decision, set aside the FPC's order and remanded it for further proceedings. Reasoning that there was only one issue presented by the appeal, "one of law: Did the Commission have jurisdiction to effectuate relief of the type sought in the petition for extraordinary relief," the court of appeals held that the FPC did have such jurisdiction. (Pet. App. A, pp. 8a, 12a)

Relying on this Court's holding in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), the court of appeals concluded that the "Commission is vested with both jurisdiction and broad powers to solve the problems caused by curtailment." (Pet. App. A, p. 9a) Accordingly, the proceeding was remanded to the Commission to consider whether a compensation plan was justified. However, the court of appeals carefully pointed out that *it was imposing no requirement that the FPC should order such a plan* unless it found it to be necessary under the Natural Gas Act.

> "In sum, we conclude that the imposition of compensation payments as a condition for the receipt of higher priority gas is within the statutory power of the FPC over the movement of such gas in interstate commerce.
>
> "Having considered the breadth of the Commission's jurisdiction, the question remains what action by this court is proper. In essence, what the Commission has done is to fail to exercise its jurisdiction by refusing to consider, with an appropriate record, a proposed remedy for an asserted wrong. *We, of course, intimate no view one way or the other as to whether compensation should be included.* This court can, however, compel

the Commission to exercise its jurisdiction by considering whether compensation is necessary to insure the justness and reasonableness under Section 4(b) of a particular curtailment plan." (Citation omitted, emphasis supplied) (Pet. App. A, p. 12a)

ARGUMENT IN OPPOSITION

A. There are "No Special and Important Reasons" for Granting the Petition

The court of appeals simply has held that the FPC *can* order a compensation plan, but it carefully did not say that it *must* order one. The decision below did not, as the Petition alleges (p. 10), "require a general restructuring of pipeline rates for sales of natural gas." At most, the FPC is required to make a fair determination (*i.e.* based upon an appropriate record) as to whether Section 4(b) of the Natural Gas Act requires a compensation plan on United's system.

Hence, the decision does not require a radical alteration of FPC procedures nor does it immediately affect the rights of pipelines or those of its customers. All that the decision requires is a hearing, and such a proceeding involving United's system is taking place at the present moment. Indeed, testimony in support of a compensation plan was filed by MP&L on May 12, 1976 (and rebuttal testimony was served on June 16, 1976). A hearing presently is underway.

In the wording of the "Question Presented," the Petition seeks to assign an immediacy to the court of appeals' decision which does not exist:

> "Whether, in connection with its approval of pipeline curtailment plans, *the Federal Power Commission is required under the Natural Gas Act to impose, in certain circumstances, proposed compensation schemes* whereby high-priority pipeline customers would make payments to low-priority customers in full or partial compensation for the increased costs of alternate fuels used by the low-priority customers as a result of the curtailment of natural gas deliveries." (Emphasis supplied) (p. 2)

The "certain circumstances" referred to do not automatically flow from the decision (and, indeed, may never exist) but can only result from the finding of the FPC, itself, on an appropriate record, that a compensation plan is necessitated by the justness and reasonableness requirement of Section 4(b) of the Natural Gas Act.

The court of appeals did not even suggest that the FPC should favor a compensation plan but carefully stated: "We, of course, intimate no view one way or the other as to whether compensation should be included." (Pet. App. A., p. 12a) Granting the Petition will mean that this Court will be required to decide an issue having no immediate effect.[4] Denial of the petition will mean that the proceedings before the FPC will continue.

In an attempt to assign a general applicability to the court of appeals' decision that was not intended, the Petition (footnote 4, p. 10) lists a number of proceedings involving other pipelines where compensation plans have been sought. This reference demonstrates the general interest throughout the industry in the question of compensation and unintentionally emphasizes the FPC's lack of sensitivity to the industry's problems in not setting hearings to consider the remedy of compensation. Hence, the Petition is merely stating that the FPC's refusal to hold hearings has been broadly attacked. There is certainly no reason why this Court should address itself to the issue of compensation now, without a factual record below, where the FPC, itself, has refused to give adequate consideration to this issue. In effect, the FPC is asking this Court to review a question in order that it might be saved the inconvenience of doing so itself.

[4]The FPC is asking this Court to render a premature decision with no factual record below when it would not even grant the Mississippi Commission an opportunity to be heard.

Clearly, there are no "special and important reasons" for granting the Petition.

B. The Decision of the Court of Appeals Clearly was Correct.

The FPC has acted strangely ever since this proceeding was initiated. Faced with the nationwide natural gas shortage, the FPC determined, rightly or wrongly, that curtailment should be based on end use considerations and should not be implemented on a *pro rata* basis. The result of this policy determination is that some pipeline customers bear most of the burden of curtailment while others bear little or none. A compensation plan simply is an attempt more equitably to distribute the burden of end use curtailment while at the same time preserve its alleged benefits. (The lower priority customer supposedly can convert more easily to alternate fuels). A compensation plan is not, as suggested by the Petition (p. 15), inconsistent with end use curtailment but is necessary because of it. *Pro rata* curtailment would not require a compensation plan. An end use curtailment plan is supposed to afford the least economic disruption by requiring fewer and larger conversions. But, because of this, those who are required to convert are severely disrupted. A compensation plan would ameliorate this hardship and achieve a better financial balance between customers in dealing with the burden of curtailment.[5] Surely, there is a basic fairness in the concept of a compensation plan.

With all this in mind, the Mississippi Commission approached the FPC, another regulatory agency, with a

[5]These "customers" are not actually the large utilities but their individual ratepayers. Hence, a compensation plan is an attempt to avoid, for example, the situation where the person with an electric stove has his rates doubled while his next door neighbor with a gas stove relatively is unaffected.

request that it utilize its considerable experience and great resources in an attempt to set up a compensation plan which would be fair to all United's customers. Instead of making a *bona fide* attempt to deal with the problem, the FPC dismissed out of hand the Mississippi Commission's request for assistance without even giving interested parties an opportunity to present their views on how a compensation plan might be constituted.

To make matters worse, the FPC apparently did not even bother to understand the request. As will be pointed out, each of the orders indicates mistake on its face. Further, the FPC made no attempt to deal with the requested relief from an equitable standpoint but simply dismissed the proceeding with a mistaken reliance on the definition of "ratemaking."

In other words, instead of following the clear intent of the Natural Gas Act and the Federal Power Act to protect the public interest and grapple with a serious problem, the FPC retreated to a simplistic reliance on a technical interpretation of the word "ratemaking."

As previously indicated, the FPC gave as its reason for summarily dismissing the Mississippi Commission's petition for relief its lack of jurisdiction to grant the relief requested because of the Natural Gas Act's requirement that a pipeline cannot be given revenues which would be greater than its cost of service plus a fair rate of return. In addition, the order stated that the Commission has no jurisdiction over the rates charged by United to its direct customers, such as the electric utilities, so as to require compensation to them.

Finally, the order concluded that the petition was "nothing more than an attempt to obtain damages because of United's inability to deliver its full contractual commitment" and that such "damage liability, in the context of

curtailments, is primarily a matter of contract law to be resolved by an appropriate court" (Pet. App. D, pp. 22a-23a).

Essentially, the FPC's position is that compensation payments result in some customers paying higher than just and reasonable "rates" and others paying less than just and reasonable "rates," and this violates the Natural Gas Act. An additional argument, also based on its definitions of "rates," is that compensation payments to direct customers constitute "ratemaking", and the FPC has no jurisdiction to set "rates" for direct industrial customers.

As the court of appeals correctly recognized, compensation is not a matter of *rates* but an adjustment to ameliorate the hardships of an end use *curtailment* plan. This Court gave the FPC wide latitude in administering curtailment plans in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972). It is puzzling why the FPC, having extended its jurisdiction into new areas (such as direct sales) in its early administration of curtailment programs, suddenly became so timid when the remedy of compensation was suggested. Even if its jurisdiction had been questionable, the FPC should have given the compensation concept a fair hearing instead of reaching for a semantic argument on the definition of "rates" to avoid its responsibility. The court of appeals was correct in requiring the FPC to assume its responsibility under the Natural Gas Act and the Federal Power Act.[6]

Further, the FPC orders were so obviously ill-considered and incorrect that it is difficult to see how a court of

[6]This Court also recently has rejected attempts by the FPC to construe its jurisdiction narrowly. *Conway Corp.* v. *FPC*, ____ U.S. ____, 44 U.S.L.W. 4777 (U.S. June 7, 1976); *NAACP* v. *FPC*, ____ U.S. ____, 44 U.S.L.W. 4659 (U.S. May 19, 1976). These holdings are discussed at pages 5-6 of United's Brief in Opposition to Petition for a Writ of Certiorari in this proceeding, dated June 18, 1976.

appeals could have affirmed them. The FPC held that a compensation plan would violate the Natural Gas Act because it would give United *higher* than just and reasonable rates (it would give *more* money to United than it deserves) (Pet. App.D., p. 22a). On the following page, the order states that the petition must be denied because it seeks damages from United and this is a matter for the courts not the FPC. Hence, the FPC held that a compensation plan would give money to United which it does not deserve and, at the same time, it might take money away from United in damages.[7] This obvious contradiction was never explained.

Commissioner Brooke, dissenting, unlike the other Commissioners, understood that the issue in this proceeding was a matter of transferring payments *among* customers of United not *to or from* United. It is axiomatic that an administrative decision must be based upon substantial evidence. *Universal Camera* v. *NLRB*, 340 U.S. 474 (1950). Clearly, error cannot constitute substantial evidence and the court of appeals could have remanded for that reason alone.

Another reversable error was the FPC's refusal to hold a hearing even though there were factual questions to be determined. In such a situation, a hearing is required by *Citizens for Allegan County, Inc.* v. *FPC*, 414 F. 2d 1125 (D.C. Cir. 1969).

The Petition (p. 12) tries to avoid complete reliance on classifying compensation payments as "rates" by stating that any "surcharges" must be based upon a pipeline's cost of service plus a reasonable rate of return. However, Section 4(a) of the Natural Gas Act, relied upon by the FPC, specifically provides that "rates and charges" are to be

[7]The possibility of compensation payments constituting an action for damages against United apparently does not concern that pipeline. United has filed a brief *opposing* the Petition.

"made, demanded, or received *by a natural gas company.*" (Emphasis supplied) Hence, the FPC's further reliance on semantics in labeling compensation payments as "surcharges" (the Act says "charges") adds nothing to its argument. Compensation payments, whether called "rates", "charges" or "surcharges", are not made to the pipeline but to its customers. The point is that compensation payments can never be retained by a pipeline.[8]

In addition, the Petition recognizes, as it must, that penalty payments for overruns[9] (some as high as $10 per Mcf) cannot possibly meet the criteria of "just and reasonable". Its attempted answer to this devasting inconsistency is no answer at all:

> "Finally, while most curtailment plans contain a provision for penalty payments for unauthorized overtakes, *the penalty provision must be filed as part of the curtailment tariff and is evaluated under the just and reasonable standard of Section 4.* Thus, the court of appeals' reliance upon an analogy between compensation payments and overtake penalty payments (App. A, infra, pp. 10a-11a) actually supports rather than undercuts the Commission's position with respect to compensation payments." (Emphasis supplied; f.n. 6, pp. 12-13)

Surely, a compensation payment provision could "be filed as part of the curtailment tariff and [be] evaluated under the just and reasonable standards of Section 4." That was exactly what the FPC was asked to do.

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[8]Compensation payments would not even have to be handled by a pipeline but could be collected and distributed by an outside financial institution.

[9]These penalties apply to overruns by direct "non-jurisdictional" customers in the same way as they do to resale jurisdictional customers. Hence, the argument made by Mississippi River Transmission Corporation in its response in support of Grant of Writ of certiorari is without merit.

CONCLUSION

For the reasons set out above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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